

I.H., Appellant

Docket No. 20-1381
Issued: April 4, 2022

² On July 13, 2020 appellant, through counsel, also filed an appeal from a purported April 29, 2020 decision of OWCP. However, the April 29, 2020 document is an informational letter, not a final decision of OWCP. The only final adverse decision over which the Board may exercise jurisdiction is the March 12, 2020 merit decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$339,114.49 for the period May 21, 2013 through September 14, 2019 because he received wage-loss compensation based on an improper pay rate; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$2,000.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On January 18, 2013 appellant, then a 42-year-old rigger/diver, filed a traumatic injury claim (Form CA-1) alleging that on January 14, 2013 he sustained a right wrist injury when he engaged in repetitive strenuous motion while in the performance of duty. OWCP initially accepted his claim for right carpal tunnel syndrome and later expanded the acceptance of the claim to include Caisson disease. Appellant stopped work in May 2013 and OWCP paid him wage-loss compensation for disability from work on the supplemental rolls commencing May 21, 2013 and on the periodic rolls commencing December 15, 2013.

On August 12, 2013 appellant commenced full-time work in a light-duty clerical position, which did not involve any type of dive work.

In a September 6, 2013 memorandum, the acting deputy chief of staff for total fleet force manpower and personnel, C.M., indicated that it had been brought to his attention that the employing establishment had been paying dive pay for divers, as authorized by reference (a), to all dive team members who were performing diving duties, as defined in reference (b), regardless of whether they were actually working under the surface of the water breathing compressed air. He noted that, after discussions with the Norfolk Naval Shipyard and the issuance of reference (b), it was understood that this practice could have started as early as 2008. C.M. indicated that, based on reference (a), divers were authorized special duty pay at the rate of 175 percent of the locality WG-10, step 2 rate for all payable hours of the shift. He further noted that reference (c), which was still current, authorized payment of the special pay rate for divers only when they were submerged in the water breathing compressed air. C.M. advised that informal discussions with compensation experts from the Office of Civilian Human Resources (OCHR) reaffirmed the initial determination that only the diver who was submerged was authorized to receive special dive pay and that further clarification on the matter had been requested from OCHR, in coordination with

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the March 12, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

Naval Sea Systems Command, to establish consistent pay practices throughout the employing establishment.

In a December 2, 2013 memorandum to OWCP, a human resources specialist for the employing establishment, P.M., indicated that, when appellant was placed on light-duty work, he no longer was engaged in dive tasks. She noted that the employing establishment had “suspended the special pay for [appellant] and other employees who are not currently doing the tasks for which the special pay is intended until further notice.” P.M. attached a copy of Office of Personnel Management (OPM) regulations, including 5 C.F.R. § 532.281(f) which provides, “[e]mployees who both dive and tend on the same shift shall receive the higher diving rate as the basic rate for all hours of the shift.”

In an August 3, 2018 letter, an employing establishment official requested that OWCP recalculate appellant’s receipt of dive pay related to his performance of diving duties in the workplace. He noted that, during an audit, questions were raised regarding appellant’s dive pay amount, *i.e.*, \$6,266.28 per month in net compensation. The official indicated that the employing establishment believed that appellant was overpaid. He noted that, when appellant filed for dive pay, the local payroll office indicated that he earned 1,054 total hours of dive work in the year prior to the date he stopped his dive work. The employing establishment official asserted that there appeared to be an error in the hours used to calculate the weekly compensation rate. He maintained that, for 1,054 hours, the bi-weekly pay was 40.54 hours and the weekly pay was 20.27 hours. The official noted that it appeared that the calculation for the weekly compensation rate was improperly based on 40.54 hours instead of 20.27 hours.⁵

In a preliminary overpayment determination dated January 17, 2020, OWCP advised appellant of its preliminary determination that he received a \$339,114.49 overpayment of compensation for the period May 21, 2013 through September 14, 2019. It advised him that, once it became aware in 2013 of his entitlement to dive pay, it amended his pay rate to include the dive pay element. OWCP noted, however, that instead of basing appellant’s dive pay on the hours he actually performed diving duties, as indicated in OWCP’s procedures, he was paid dive pay for 40 hours per week.⁶ It indicated that, in essence, his pay rate was based on the incorrect notion that he was actually diving eight hours per day, five days per week. OWCP indicated that the incorrect payments began on May 21, 2013 and continued through September 14, 2019. Effective September 15, 2019, the payments were adjusted to accurately reflect appellant’s entitlement to dive pay based on his actual time diving. OWCP also made a preliminary determination that appellant was at fault in the creation of the overpayment because he accepted payments that he knew, or reasonably should have known, to be incorrect. It provided him with an overpayment action request form and notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. OWCP also advised appellant that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of the overpayment. It requested that he complete and return

⁵ On July 5, 2019 appellant retired from the employing establishment on disability retirement.

⁶ OWCP indicated, “At the time of your injury you were employed as a Rigger/Diver. This position includes a premium pay element referred to as ‘dive pay.’ According to the Federal (FECA) Procedure Manual: Dive pay is authorized for wage system employees for those hours when they are actually performing diving duties.”

an overpayment recovery questionnaire (Form OWCP-20) with supporting documentation within 30 days.

In a memorandum accompanying the preliminary overpayment determination, OWCP explained its calculation of the \$339,114.49 overpayment, noting that all incorrect payments were based on a weekly pay rate of \$3,424.19 (\$1,338.89 base pay plus \$2,085.30 incorrect dive pay). It noted that appellant's correct weekly pay rate was \$2,047.56 (\$1,338.89 base pay plus \$708.67 correct dive pay). For the period May 21 through June 17, 2013, OWCP paid wage-loss compensation benefits of \$2,101.53 due to time lost for medical appointments he attended. It noted that, for this period, it should have paid appellant \$1,727.63 and, therefore, he received a \$373.90 overpayment. For the period August 9, 2013 through September 14, 2019, OWCP paid wage-loss compensation benefits in the amount of \$515,659.90, which included loss of dive pay. It advised that, for this period, it should have paid him \$176,955.18 and; therefore, he received a \$338,704.72 overpayment. On October 24, 2014 OWCP paid appellant \$94.33 due to a medical appointment. It noted that he should have been paid \$58.46 and, therefore, he received a \$35.87 overpayment. OWCP indicated that the total of these separate overpayment figures was \$339,114.49.⁷

In an overpayment action request form signed on February 18, 2020, appellant indicated that he believed that he was not at fault in the creation of the overpayment and that he wished to request waiver of recovery of the overpayment. He submitted a Form OWCP-20 in which he listed \$2,900.00 in monthly income, \$2,200.00 in monthly expenses, and \$353,650.00 in assets. On the form appellant asserted that, when he saw that his pay was higher than normal, he was told by his local representative that it was because the pay was tax-free. Appellant maintained that the amount of dive pay was an "enigma" to him.

By decision dated March 12, 2020, OWCP finalized its preliminary overpayment determination that appellant received a \$339,114.49 overpayment of compensation because he received wage-loss compensation based on an improper pay rate. It also finalized its preliminary determination that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP noted that the evidence it received from appellant was insufficient because it did not refute the fact he accepted payments, which he knew or should have known to be incorrect. It noted that the overpayment inflated his pay by 60 percent in that he received \$71,585.52 more per year than the \$106,473.36 to which he was entitled, and that the amount was significant enough to put him on notice that his compensation was incorrect. OWCP required repayment of the overpayment by deducting \$2,000.00 from appellant's continuing compensation payments every 28 days. It noted that the \$2,000.00 deduction was appropriate given his financial situation, including the fact that he had \$353,650.00 in assets.

⁷ The case record contains numerous documents relating to the calculation of the \$339,114.49 overpayment, including pay records, overpayment calculation worksheets, and employment establishment records of appellant's dive activities at work.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁸ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁹ Section 8129(a) of FECA provides, in pertinent part that, when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation for the period May 21, 2013 through September 14, 2019.

OWCP presented evidence showing that appellant's wage-loss compensation for the period May 21, 2013 through September 14, 2019 was based on a weekly pay rate of \$3,424.19, which was comprised of \$1,338.89 in base pay per week plus \$2,085.30 in dive pay per week. These pay figures show that appellant effectively received dive pay, substantially exceeding his base pay, which effectively provided him supplemental dive pay for all of his work hours in a given week regardless of the amount of dive work he performed. Appellant did not perform dive duties for all of his work shifts between May 21, 2013 and September 14, 2019 as he worked in a light-duty position unrelated to diving for an extended portion of this period. The case record contains no evidence establishing that he was entitled to dive pay for all the work hours he received dive pay during the period May 21, 2013 through September 14, 2019. Therefore, the Board finds that appellant received an overpayment during the period May 21, 2013 through September 14, 2019.

However, the Board further finds that the case is not in posture for decision regarding the precise amount of the overpayment that appellant received for the period May 21, 2013 through September 14, 2019. This is due to the fact that the evidence of record presents at least two differing explanations of the amount of dive pay to which appellant was entitled during the period May 21, 2013 through September 14, 2019. In a September 6, 2013 memorandum, the acting deputy chief of staff for total fleet force manpower and personnel, C.M., indicated that it had been brought to his attention that the employing establishment had been paying dive pay to all dive team members who were performing diving duties regardless of whether they were actually working under the surface of the water breathing compressed air. He indicated that inquiries had been made as to the proper manner of determining dive pay. In conjunction with a December 2, 2013 memorandum to OWCP, a human resources specialist for the employing establishment, P.M., attached a copy of OPM regulations, including 5 C.F.R. § 532.281(f) which provides, "Employees who both dive and tend on the same shift shall receive the higher diving rate as the basic rate for all hours of the shift." However, OWCP maintained that appellant was only entitled to receive

⁸ *Supra* note 3.

⁹ 5 U.S.C. § 8102(a).

¹⁰ *Id.* at § 8129(a).

dive pay for the number of hours in a given shift that he was actually engaged in diving under the surface of the water.

OWCP has not adequately explained, in light of these circumstances, how it determined that appellant received a \$339,114.49 overpayment during the period May 21, 2013 through September 14, 2019. In the January 17, 2020 preliminary overpayment determination and March 12, 2020 final overpayment determination, it did not cite any specific law, rule, procedure, or regulations to explain its calculation of dive pay. In its January 17, 2020 preliminary overpayment determination, OWCP only made a general, nonspecific reference to its procedures, without citing or quoting any particular element of such procedures, to support the \$339,114.49 overpayment.

In deciding matters pertaining to a given claimant's entitlement to compensation benefits, OWCP is required by statute and regulations to make findings of fact.¹¹ The Federal (FECA) Procedure Manual further specifies that a final decision of OWCP "should be clear and detailed so that the reader understands the reason for the disallowance of the benefit and the evidence necessary to overcome the defect of the claim."¹² These requirements are supported by Board precedent.¹³

Therefore, the Board finds that the case must be remanded to OWCP for a decision that contains adequate findings of fact and reasons regarding the calculation of the amount of the overpayment appellant received during the period May 21, 2013 through September 14, 2019. After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision regarding the overpayment.¹⁴

CONCLUSION

The Board finds that appellant received an overpayment of compensation for the period May 21, 2013 through September 14, 2019. The Board further finds that this case is not in posture for decision regarding the amount of the overpayment appellant received during the period May 21, 2013 through September 14, 2019.

¹¹ *Id.* at § 8124(a) provides that OWCP "shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP "shall contain findings of fact and a statement of reasons."

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5c(3)(e) (February 2013).

¹³ See *P.G.*, Docket No. 17-1461 (February 7, 2019); *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

¹⁴ In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: April 4, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board